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NO. 87-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

INDEPENDENT COMMUNITY BANKERS
ASSOCIATION OF SOUTH DAKOTA, INC.

Petitioner,

v.

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,

Respondent,

and

FIRST CITY BANCORPORATION OF TEXAS, INC.

Respondent-Intervenor.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE DOUGLAS AMENDMENT, § 3(d) OF THE BANK HOLDING ACT (BHCA), AUTHORIZES A BANK HOLDING COMPANY TO ACQUIRE AND OPERATE A LIMITED SERVICE NATIONAL BANK LOCATED OUTSIDE THE HOLDING COMPANY'S HOME STATE.

II.

WHETHER THE SOUTH DAKOTA BANK ACQUISITION STATUTES, WHICH CONDITION THE ACTIVITIES OF NATIONAL BANKING ASSOCIATIONS, CONFLICT WITH AND FRUSTRATE FEDERAL BANKING LAW.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, Independent Community Bankers Association of South Dakota, Inc., has been a party to this litigation from the beginning, and will be referred to as "ICBA." Respondent, Board of Governors of the Federal Reserve System, has also been a party to this litigation from the beginning, and will be referred to as the "Board." The Intervenor below, First City Bancorporation of Texas, Inc., has been party to this litigation from the beginning as well and will be referred to as "First City."

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT iii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES viii

OPINIONS BELOW xi

JURISDICTIONAL STATEMENT 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 6

I. DOUGLAS AMENDMENT ISSUE 6

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.. 6

1. Whether the Douglas Amendment Allows States to Permit the Acquisition of National Banks Raises an Important And Novel Question of Statutory Construction 6

2. The Ambiguous Language and Legislative History of the Douglas Amendment Raises an Important And Novel Question of Statutory Interpretation 7

a. The language of the Douglas Amendment is ambiguous 9

b. The legislative history of the Douglas Amendment is likewise ambiguous 10

II. THE SOUTH DAKOTA BANK ACQUISITION STATUTES ISSUE 12

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT 12

1. The Operation and Effect of the South Dakota Bank Acquisition Statutes on National Banks Raises Important And Novel Questions of Statutory Interpretation..... 12

2. The Compatibility of the South Dakota Bank Acquisition Statutes with National Banking Laws Raises Important And Novel Questions of Federal Law 15

CONCLUSION 18

JOINT APPENDIX ..... Separate

TABLE OF AUTHORITIES

Page

CASES:

Davis v. Elmira Savings Bank, 161 U.S. 275 (1896) 15

First National Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966) 12

Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System, 820 F.2d 428 (D.C. Cir. 1987) 6, 7, 14, 16

Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980) 15, 16

Northeast Bancorp., Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159 (1985) 15

STATUTORY REFERENCES:

S.D. Codified Laws Ann.
§ 51-16-40 (1983) 2, 5

S.D. Codified Laws Ann.
§ 51-16-41 (1983) 2, 5

S.D. Codified Laws Ann.
§ 51-16-42 (1983) 2, 5

S.D. Codified Laws Ann.
§ 51-16-43 (1980) 2

S.D. Codified Laws Ann.
§ 51-16-44 (1980) 2

12 U.S.C. § 36 et seq. 2, 11

12 U.S.C. § 1841 et seq. 2, 3, 4, 6, 8, 9

28 U.S.C. § 1254(l) 2

OTHER REFERENCES:

76 Cong. Rec. 2511 (1933) 12

102 Cong. Rec. 6858 (1956) 11

102 Cong. Rec. 6860 (1956) 11

102 Cong. Rec. 6862 (1956) 11

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit is reported as Independent Community Bankers Association of South Dakota, Inc. v. Board of Governors of the Federal Reserve System, 820 F.2d 428 (D.C. Cir. 1987) and is reprinted in the Joint Appendix at A-1-30.

The Decision of the Board has not been reported. It is reprinted in the Joint Appendix at A-33-42.

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Respondent.

and

FIRST CITY BANCORPORATION OF TEXAS, INC.

Respondent-Intervenor.

ICBA respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 5, 1987.

JURISDICTIONAL STATEMENT

The Judgment of the Court of Appeals for the District of Columbia Circuit was entered on June 5, 1987. See A-31-32. A Petition for a Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

1. U.S. Const. art. VI, cl. 2:

   This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

2. 12 U.S.C. § 36(c) (1982), 12 U.S.C., § 36(h) (1982), 12 U.S.C., § 1841(a)(1) (1966), 12 U.S.C., § 1841(a)(5) (1966), 12 U.S.C., § 1841(b) (1966), 12 U.S.C., § 1841(c) (1966), 12 U.S.C., § 1842(d) (1966), 12 U.S.C. § 1848, (1956), which are set forth at A-43-50.

3. S.D. Codified Laws Ann. §§ 51-16-40 (1983), 51-16-41 (1983), 51-16-42 (1983), 51-16-43 (1980), 51-16-44 (1980), which are set forth at A-51-54.

STATEMENT OF THE CASE

First City is a Texas corporation and bank holding company which applied to the Board to obtain approval for the acquisition of a South Dakota national bank. The bank would engage primarily in offering bank credit card services to customers in states other than South Dakota. The national bank to be acquired is located in Sioux Falls, South Dakota. ICBA, a trade association representing chartered national and state banks located in South Dakota, opposed this proposed acquisition in proceedings before the Board. The Board approved the acquisition, and the Court of Appeals for the District of Columbia Circuit affirmed the Order of the Board. ICBA now seeks a Writ of Certiorari, on the basis that the acquisitions were not authorized by the Bank Holding Company Act of 1956, 70 Stat. 133, as amended, 12 U.S.C. § 1841 et seq., and that, if they were authorized by the Act, the South Dakota statutes which permitted the acquisition violated federal law.

The Bank Holding Company Act (BHCA), 12 U.S.C. § 1841 et seq., regulates the acquisition of state and national banks by bank holding companies. The Act generally defines a bank as any institution organized under state or federal law which "... (1) accepts deposits that the depositor has a legal right to withdraw on demand, and (2) engages in the business of making commercial loans ...." 12 U.S.C. § 1841(c). The Act defines a bank holding company as any corporation, partnership, business trust, association or similar organization that owns or has control over a bank or another bank holding company. §§ 1841(a)(1), (b); see § 1841(a)(5). Before a company may become a bank holding com-

pany, or a bank holding company may acquire a bank or substantially all of the assets of a bank, the Act requires it to obtain the approval of the Board. 12 U.S.C. § 1842.

The Board will evaluate the proposed transaction for anticompetitive effects, financial and managerial resources, community needs, and the like. 12 U.S.C. § 1842(c). In addition, § 3(d) of the Act, 12 U.S.C. § 1842(d), known as "the Douglas Amendment," prohibits the Board from approving an application of a bank holding company or bank located in one state to acquire a bank located in another state, or substantially all of its assets, unless the acquisition "is specifically authorized by the statute laws of the state in which such bank is located, by language to that effect and not merely by implication." Pursuant to the Douglas Amendment, a number of states, including South Dakota, recently have enacted "special purpose" bank acquisition statutes. Generally these statutes permit out-of-state organizations to set up in-state banks that do not compete with locally controlled full-service banks. This case requires the Court to consider the validity of these statutes.

From 1956 to 1972, the Douglas Amendment had the effect of completely barring interstate bank acquisitions because no state had enacted the requisite authorizing statute. Beginning in 1972, several states passed statutes permitting such acquisitions in limited circumstances for specialized purposes.

In 1980, South Dakota enacted its special purpose legislation designed to lift the Douglas Amendment's ban on interstate acquisitions. In relevant part, the

South Dakota's bank acquisition statutes (S.D. Codified Laws Ann. §§ 51-16-40, -41, -42,) see A-51-53, permit an out-of-state bank holding company to acquire "all or substantially all of the shares of a single new bank which is established under the laws of this state. . . and a single new national bank which is to be located in this state." S.D. Codified Laws Ann. § 51-16-40(a) (1983). The South Dakota statutes limit the operation of such acquired banks to a single banking office. They also require that the office "be operated in a manner and at a location which is not likely to attract customers from the general public in the state to the substantial detriment of existing banks in the state. Id. § 51-16-41. In addition, the South Dakota statutes make all such interstate bank acquisitions subject to the approval of the South Dakota Banking Commission (the "Commission") and to any conditions that the Commission deems necessary.

On May 3, 1984, First City submitted a proposal to the Commission to acquire a nationally chartered bank to be located in Sioux Falls and designed to engage primarily in offering bank credit card services to customers in the states of Texas, Louisiana, Arkansas, Oklahoma, Colorado and New Mexico. The Commission authorized the proposed acquisition, subject to the conditions prescribed by the South Dakota bank acquisition statutes, and rendered its final approval contingent on approval by the Comptroller of the Currency (the "Comptroller") and the Board. Shortly thereafter, the Comptroller granted preliminary approval for the requested national bank charter, thereby clearing the way for the final steps in organizing the bank. First

City then applied to the Board under § 3(a)(3) of the BHCA to acquire all of the voting shares of the newly chartered national bank.

ICBA intervened in the proceedings before the Board, opposing First City's application. In an Order dated July 12, 1985, the Board approved First City's application.

Pursuant to 12 U.S.C. § 1848, which allows "[a]ny party aggrieved by an order of the Board" to seek review in a federal court of appeals, see A-49, IBCA timely filed a Petition for Review of the Board's decision with the United States Court of Appeals for the District of Columbia Circuit. On June 5, 1987, the Court of Appeals denied the ICBA's petition. 820 F.2d at 440-41.

REASONS FOR GRANTING THE WRIT

I.

DOUGLAS AMENDMENT ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. Whether the Douglas Amendment Allows States to Permit the Acquisition of National Banks Raises an Important and Novel Question of Statutory Construction.

ICBA argued below that the Douglas Amendment does not authorize a state to permit an out-of-state bank holding company to acquire a national bank located within its borders. As the Court of Appeals recognized, see 820 F.2d at 432, this claim presents a novel question of statutory construction. Although Congress enacted the Douglas Amendment more than thirty (30) years ago, to date, neither the Board nor any Court has ever addressed this issue. Id. During the past fifteen years, the Board has routinely approved the acquisition of national banks in states that have statutes under the Douglas Amendment which allow the acquisition of in state banks by out-of-state holding companies. This is the first time, however, that a party has claimed that the Douglas Amendment limits interstate acquisition to state banks only. In light of the novelty of this issue, review by this Court through a Writ of Certiorari is necessary.

2. The Ambiguous Language and Legislative History of the Douglas Amendment Raises an Important and Novel Question of Statutory Interpretation.

The Douglas Amendment consists of two operative provisions. The first provision prohibits interstate bank holding company expansion generally. The second provision provides for the lifting of this ban under certain circumstances. The dispute in this case centers around the scope and effect of the second provision of the Douglas Amendment, which provides in pertinent part as follows:

> . . . no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on [July 1, 1966,] or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-state bank holding company is specifically authorized by the statute laws of the State in which such bank is located by language to that effect and not merely by implication. . . .

12 U.S.C. § 1842(d). (Emphasis added) The Court of Appeals opined that this provision, and the Douglas Amendment as a whole, permitted an out-of-state bank holding company to acquire an in-state national bank if the state in which the national bank is located has authorized the interstate acquisition of local state chartered banks. The Court's opinion, however, represents an erroneous and over-inclusive reading of the Douglas Amendment and particularly the second provision of the amendment. If anything, the language and legislative history are ambiguous. Interpretation by this Court, therefore, is necessary to extend guidance to federal and state banking authorities and to the banking industry.

a. The language of the Douglas Amendment is ambiguous.

Prior to 1966, the BHCA defined "bank" as "any national banking association or any State bank, savings bank, trust company . . .". See Explanatory Notes to 12 U.S.C. § 1841(c). The Act, therefore, up until 1966, distinguished between "national banks" and "state banks".

In 1966, Congress amended the definition of "banks" to encompass "institution[s] organized under the laws of the United States, any state of the United States, the District of Columbia, any territory of the United States, Puerto Rico, Guam, American Samoa [and] the Virgin Islands." See 12 U.S.C. § 1841(c). Congress, did not alter in 1966 or at any time subsequent thereto, the language of § 3(d) of the BHCA which continues to distinguish "State banks" from "banks" in general. Had Congress desired to broaden the scope of § 3(d) to include acquisitions of national banks, it would have done so in 1966 or in a subsequent amendment, by inserting the generic word "bank" in the place of the specific words "State bank." Instead, readers of the Act are left wondering why § 3(d) still makes reference to "State bank" and whether the Douglas Amendment is intended to include acquisitions of national banks. Since no prior interpretative precedent exists of the Douglas Amendment and the amendment's language is ambiguous on its face, this Court should grant certiorari and provide a definitive interpretation.

b. The legislative history of the Douglas Amendment is likewise ambiguous.

Moreover, the legislative history of the Douglas Amendment is ambiguous and provides little interpretative assistance in evincing congressional intent. The amendment's entire legislative history is confined to the Senate floor debate and particularly the remarks of Senators Payne and Douglas.

According to one of the co-sponsors of the amendment, Senator Payne, the purpose of the amendment was to facilitate state's rights and control over state banks. In doing so, Senator Payne remarked as follows:

> . . . This amendment would require that state legislatures pass specific legislation authorizing bank holding companies from another state to acquire interests in State banks located within its borders. The purpose of this Amendment is to return to the State their traditional control over the activities of the State banks now nominally under the State's authority.
>
> * * *
>
> . . . It is not my intention to question the capacity of the Federal Reserve Board to carry out the will of the Congress, but it seems to me that the control of expansion of bank holding companies across State lines into State banks is a matter of primary concern to the State government and is an area best left to their discretion rather than to have it

> solely under the jurisidiction of the Federal Reserve Board.
>
> * * *
>
> ... The Douglas Amendment would reestablish State authority over State banks. ...

102 Cong. Rec. 6862 (1956); c.f. A-58-60. As evidenced by Senator Payne's comments, the floor debate concerning the Douglas Amendment took on a state's rights air. The purpose of the Douglas Amendment, in Senator Payne's view, was to allow the state, as opposed to Congress, to determine if any state wished to have an out-of-state bank holding company do business within its borders.

Senator Douglas on the other hand believed:

> (w)hat our amendment aims to do is to carry over into the field of holding companies the same provisions which already apply for branch banking under the McFadden Act — namely, our Amendment will permit out-of-state holding companies to acquire banks in other states only to the degree that state laws expressly permit them.

102 Cong. Rec. 6858 (1956). See also, Id. at 6860; A-56.

In enacting the McFadden Act, 12 U.S.C. § 36(c), see A-43-44, in 1927, Congress relaxed federal restrictions on branch banking by national banks, but at the same time subjected them to the same branching restrictions imposed by the states on State banks. Congress

intended "to leave the question of desirability of branch banking up to the states," First National Bank v. Walker Bank & Trust Co., 385 U.S. 252, 258 (1966), and to permit branch banking by national banks " 'and only those states the laws of which permit branch banking, and only to the extent that the state laws permit branching banking.' " Id. at 259, (quoting Senator Glass, 76 Cong. Rec. 2511 (1933)). To Senator Douglas, the Douglas Amendment would operate in a similar way.

Senator Payne, however, spoke only of allowing the state to control State banks, believing that control of national banks should be left exclusively to the federal government under the preemption doctrine.

In light of the conflicting legislative history of the Douglas Amendment's co-sponsors, an interpretative explanation from this Court is needed.

II.

THE SOUTH DAKOTA BANK ACQUISITION STATUTES ISSUE

A. THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

1. The Operation and Effect of the South Dakota Bank Acquisition Statutes on National Banks Raises Impor-

tant and Novel Questions of Statutory Interpretation.

ICBA asserted below that, even if the Douglas Amendment permits interstate acquisition of national banks, the Board exceeded its authority or abused its discretion in approving First City's application because the South Dakota bank acquisition statutes place impermissible restrictions on the operations of national banks acquired by out-of-state bank holding companies under the statutes. This claim, like ICBA's claim concerning the Douglas Amendment, is an issue of first impression. No court has ever construed the Board's authority under the BHCA to approve an acquisition of a national banking association where the state has conditioned the activities of a national banking association through "special purpose" legislation. Although the Board and the Comptroller have alluded to this issue in recent decisions, none of the decisions have ever been passed on by any state or federal court. The novelty of the issue alone, therefore, justifies review by the Court.

In addition, at least nine other states have enacted special purpose bank acquisition statutes which, in substance, mirror those found in South Dakota. See e.g., Del. Code Ann., Tit. 5, § 801 et seq. (Supp. 1986). Interpretation by the Court is necessary to provide direction not only to South Dakota and the nine other states which have adopted special purpose statutes, but also to the Board and the banking industry as a whole.

In addition, review is necessary to address the important concerns raised by the Court of Appeals re-

garding future application of South Dakota's special purpose statutes. The Court of Appeals observed that the special purpose statutes could offend federal banking law in future applications. 820 F.2d at 440. The Court went on to recognize that there was ample potential for state-federal conflicts under the terms of the special purpose statutes. Id. In doing so, the Court noted that the statutes rendered acquisitions "subject to such conditions as the Commission deems necessary" and expressed concern about the lack of any explicit statutory limitation on the Commission's conditioning authority. Id. Interpretive construction and elucidation from this Court is therefore crucial so that states like South Dakota with special purpose statutes as well as the Board and the banking industry in general, may know what conditions may be placed on a bank holding company's interstate acquisition of a nationally chartered bank.

Moveover, interpretation is needed to address the concern, on the part of both the Board and the Court of Appeals, about the trend toward the establishment of limited service banks controlled by out-of-state bank holding companies. See A-40-41; 820 F.2d at 440. To the Board and the Court, such a trend raises serious public policy questions. By the Board's and Court's own comments, it is clear that the flag is raised not only in South Dakota and other states having special purpose statutes in place, but in the federal government as well, that banking laws need to be overhauled to conform with federal law. This Court can define the boundaries for making these changes and is called upon, in this case, to do so through a Writ of Certiorari.

2. The Compatibility of the South Dakota Bank Acquisition Statutes with National Banking Law Raises Important And Novel Questions of Federal Law.

Nationally chartered banks are federal institutions and as such, are subject to the paramount authority of federal law. Congress, however, may confer power upon states to regulate national banks, see Lewis v. BT Investment Managers, Inc., 447 U.S. 27, 44 (1980) and Northeast Bancorp. Inc. v. Board of Governors of the Federal Reserve System, 472 U.S. 159, 174 (1985), so long as the state regulation does not expressly conflict with the laws of the United States and either frustrate the purpose of federal law or impair the efficiency of national banks to discharge the duties, for the performance of which they were created. See Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896). In the instant case, at least two important questions of statutory interpretation are raised by the unique interplay between the South Dakota bank acquisition statutes, the Douglas Amendment and other national banking laws. First, whether the Douglas Amendment confers upon the states the authority to limit the activities of national banks acquired by out-of-state holding companies. Second, if the amendment does not confer such authority, whether the South Dakota statutes conflict with and frustrate federal banking law.

These questions in turn raise an additional predicate question dealt with by both the Board and the Court of Appeals, namely, whether Congress, as opposed to South Dakota, restricts the operations of a national bank acquired under the South Dakota bank acquisi-

tion statutes. According to the Board, the South Dakota statutes directly impose no restrictions on national banks acquired by out-of-state holding companies despite the statutes' language purporting to do so; the conditions outlined by the South Dakota statutes are transmitted to the national banks by the Douglas Amendment through the mechanism of the amendment's parallel lifting of the interstate expansion ban. Essentially, the Board opined that these conditions, as imposed on national banks, are matters of federal law and as such, raise no potential conflict between state and federal law. The Court of Appeals, however, rejected the notion that it is Congress, through silent and blanket assimilation in the Douglas Amendment, that has imposed the restrictions on the operations of acquired national banks. See 820 F.2d at 436-37. Yet whether it is Congress or South Dakota which restricts national bank operations is a debatable question that only this Court can resolve.

The same holds true with respect to the question of whether Congress created, through the Douglas Amendment, the specific authority for South Dakota and other states to impose restrictions on national banks. ICBA asserted below that the BHCA neither allows nor authorizes a state to impose conditions on the activities of either an out-of-state bank holding company or, more particularly, a national banking institution acquired by a bank holding company. As authority for its argument, ICBA cited Lewis, where this Court observed that "it is doubtful that [the Douglas Amendment] authorizes state restrictions of any nature on

bank holding company activities." 447 U.S. at 47. This statement, at a minimum, creates uncertainty as to the ability of states to utilize the BHCA to eliminate the activities of a national bank acquired by an out-of-state bank holding company. It is therefore imperative that the Court clarify its statement and resolve the question at hand. For this reason, review is warranted.

Review is also warranted to resolve the question of whether the South Dakota bank acquisition statutes conflict with and frustrate federal banking laws. ICBA argued below that by restricting the acquired national bank to a single office, the South Dakota statutes create a per se prohibition on branch banking in violation of the McFadden Act. ICBA also argued that by requiring that the acquired national bank not compete for customers with existing local banks, the South Dakota statutes constrict the operation of an otherwise fully operational national bank in contravention of its charter mandate and national banking laws. Specifically, ICBA asserted that such a prohibition on competition frustrates the purpose of national banking legislation and impairs the efficiency and ability of the acquired national bank to discharge its federal banking duties. The Court of Appeals, however, dismissed both of these arguments. Nonetheless, whether the South Dakota statutes and other special bank acquisition statutes run contrary to or frustrate national banking laws is a question of vital significance to federal and state banking authorities and to the banking industry as well. Review by this Court, therefore, is urged to resolve this important question.

CONCLUSION

For the foregoing reasons, Independent Community Bankers Association of South Dakota, Inc. respectfully requests that a Writ of Certiorari issue to review the Judgment of the District of Columbia Court of Appeals.

Dated this 2nd day of September, 1987.

Respectfully submitted,

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